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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE MEAD CORPORATION,
Petitioner,

v.

B.E. TILLEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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ARGUMENT

In response to this Court's invitation, the Solicitor General submitted a Brief for the United States As Amicus Curiae on May 28, 1992. As the Solicitor General's submission makes clear, the United States—and more specifically, the Pension Benefit Guaranty Corporation ("PBGC") and the Internal Revenue Service ("IRS")—agrees with petitioner The Mead Corporation ("Mead"): (1) that the construction of federal pension law provisions adopted by "the court of appeals was wrong" (SG Br. 10); (2) that, with respect to interpreting "contingent liabilities" under Internal Revenue Code ("Code") § 401 (a)(2), "the Fourth Circuit's approach is contrary to that used by other circuits" (SG Br. 15); (3) that, with respect to interpreting the other pension law provision at issue here—"actuarial error" under Code § 401(a)(2)

and Treas. Reg. § 1.401-2(b)—there is a square conflict in the circuits (SG Br. 12, 15); and (4) that it "would be of significance" if the Fourth Circuit or other courts followed in the future the Fourth Circuit's approach to either the "contingent liabilities" or "actuarial error" provisions (SG Br. 17). In disagreement with Mead, however, the Solicitor General suggests that review is not warranted because the meaning of the "contingent liabilities" and "actuarial error" provisions either was clarified by the enactment of the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 ("REA"), or will be clarified by an unspecified "regulation project" that the Solicitor General indicates has been "initiated" by the IRS. (SG Br. 15-17)

Mead is at a loss to understand the Solicitor General's position, which conflicts directly with the PBGC's statements to the Fourth Circuit in urging rehearing en banc. (*See* PBGC Br. In Support Of Rehearing (reprinted at Pet. App. 178a-190a)) In all events, neither the enactment of REA nor this previously-undisclosed regulatory effort justifies denying review of a decision that the Solicitor General concedes is wrong, in conflict with other courts of appeals and the views of the responsible administrative agencies, and potentially destructive of the sound administration of our nation's pension system.[1]

I. REA DID NOT CLARIFY THE PENSION LAW PROVISIONS MISCONSTRUED BY THE DECISION BELOW AND DOES NOT ELIMINATE THE NEED FOR REVIEW BY THIS COURT

The Solicitor General's "primary reason" for suggesting that review is not warranted "is Congress's enactment of [REA]." (SG Br. 15) As the Solocitor General sees it (SG Br. 15-16), REA will ensure that courts in the fu-

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[1] Indeed, in light of the Solicitor General's full endorsement (SG Br. 10-12) of the analysis in Judge Chapman's lengthy dissent (Pet. App. 16a-32a), it may be appropriate for this Court to summarily reverse the decision below on the basis of that dissent.

ture will construe pension law terms of art incorporated in pension plans in a manner consistent with the established meaning of those terms under ERISA and the Code. This reasoning is simply incorrect.

First, REA is hardly a new development. The statute dates from 1984, and was fully in place even before the Fourth Circuit's and this Court's initial decisions in this case. Far from believing that REA drained this case of significance, this Court commented—three years *after* REA's enactment—that the questions it remanded for decision in this case presented "complicated and important issues pertaining to the private pensions of millions of workers." (Pet. App. 44a n.11) On remand to the Fourth Circuit, the parties' briefs analyzed REA in detail, and REA's impact on the legal analysis of the issues in the case was fully discussed at oral argument. REA was cited by the panel majority (Pet. App. 10a n.3), and, as the Solicitor General himself notes (SG Br. 9), was discussed in detail in Judge Chapman's dissent (Pet. App. 27a-29a). But the Solicitor General's prediction (SG Br. 16) is belied by the fact that REA's existence hardly "clarified" matters here. The panel split 2-1, and, far from "clarifying" the issues, REA served only as an additional source of disagreement. The panel majority viewed REA as a "complication" (Pet. App. 10a n.3), not the type of "clarification" that the Solicitor General suggests; while Judge Chapman's lengthy and carefully-reasoned dissent concluded that REA "confirms" that Mead's construction of the pension law provisions at issue is correct (Pet. App. 27a). The entire Fourth Circuit similarly was deeply divided on the issues presented in this case, and denied Mead's petition for rehearing en banc by a 6-5 vote. (Pet. App. 62a-63a) There is no reason to believe that REA will "clarify" matters for other courts of appeals any more than it has for the Fourth Circuit.

Second, in suggesting (SG Br. 15-17) that REA's enactment obviates the need for review because it "makes

clear how unreduced early retirement benefits are to be treated," the Solicitor General has confused two entirely different statutory provisions. REA amended Code § 411 (d) (6) to provide that plan participants are entitled to receive unearned early retirement benefits if they eventually satisfy the plan's conditions. This amendment to Code § 411(d) (6) cannot ensure that courts in the future properly will construe "contingent liabilities" and "actuarial error," for those provisions derive from entirely different statutory and regulatory provisions—Code § 401 (a) (2) and Treas. Reg. § 1.401-2(b).

As the Solicitor General recognizes (SG Br. 11-13, 16-17), the decision below construed "contingent liabilities" under Code § 401(a) (2) so as to provide considerably more generous relief than that available under Code § 411(d) (6). The clarity of the more limited Code § 411(d) (6) remedy does nothing to narrow the Fourth Circuit's erroneous construction of Code § 401(a) (2). The Solicitor General's suggestion (SG Br. 16) that REA will induce future plaintiffs not to rely on that construction of Code § 401(a) (2) and seek the broader relief it makes available is surely a vain and empty hope.

In any event, REA has no possible role to play in clarifying the correct meaning of the other pension law provision at issue here—"actuarial error." The amendments to Code § 411(d) (6) implemented by REA do not even tangentially address the "actuarial error" concept. Indeed, revenue rulings both before and after REA's enactment use identical language to explain the meaning of "actuarial error" under Treas. Reg. § 1.401-2(b); Revenue Ruling 83-52 and Revenue Ruling 85-6 both provide that "[a]fter satisfaction of [fixed and contingent] liabilities, an employer may recover any remaining funds from the plan as surplus resulting from actuarial error." Rev. Rul. 83-52, 1983-1 C.B. 87, 87 (Pet. App. 75a); Rev. Rul. 85-6, 1985-1 C.B. 133, 134. Thus, REA has done nothing to "clarify" "actuarial error," and the court

of appeals' decision to give that term a meaning that the Solicitor General acknowledges (SG Br. 12, 15) is at odds with the "IRS's rulings" and "[o]ther courts of appeals," demands review by this Court.

Third, as the Solicitor General pointed out (SG Br. 15), the fundamental error in the decision below is that it "ignored" agency regulations and revenue rulings, rather than "defer[] to [the] IRS in interpreting plans." Given the nature of this mistake, it is difficult to comprehend the logic of the Solicitor General's prediction (SG Br. 15-17) that the amendment of Code § 411(d)(6) by REA will lead courts in the future to defer to agency interpretations of "contingent liabilities" and "actuarial error" under Code § 401(a)(2) and Treas. Reg. § 1-401-2(b). Indeed, by focusing on the structural problems with the decision below, the Solicitor General has recognized that the error in this case is more fundamental than the proper interpretation of "contingent liabilities" and "actuarial error." The Fourth Circuit has failed completely to heed this Court's instructions (Pet. App. 43a) in remanding this case to "consider the views of the PBGC and the IRS." Thus, review is necessary to confirm the correct interpretative approach: courts must construe pension law terms incorporated into pension plans by reference to the ERISA and Code provisions from which those terms are derived and by granting deference to agency interpretations of those statutory provisions. *See generally Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

Finally, in pointing to REA as a panacea, the Solicitor General has overlooked the fact that many pre-REA pension plan terminations remain subject to challenge. The Solicitor General asserts (SG Br. 16) that most pre-REA claims "should now be time-barred." But while the Solicitor General makes this assertion by way of endorsing the respondents' analysis (SG Br. 16), he apparently has ignored respondents' own calculations that claims are not yet time barred in eight states spanning seven judicial

circuits (including, significantly, the Fourth Circuit): Rhode Island from the First Circuit; West Virginia from the Fourth Circuit; Louisiana from the Fifth Circuit; Kentucky and Ohio from the Sixth Circuit; Illinois from the Seventh Circuit; Montana from the Ninth Circuit; and Wyoming from the Tenth Circuit. (*See* Opp. App. 5a-7a).

Moreover, the Solicitor General's reliance on a time bar as a reason to deny review reflects a basic misunderstanding of pension plan terminations and the claims that arise from those terminations. The Solicitor General views plan termination as taking place at a single point in time and assumes that the termination itself is the only possible event that could trigger the limitations period. In reality, it generally takes a substantial period of time after plan termination to calculate the proper benefit payments and to begin making those payments. In addition, post-termination pension payments to participants may begin decades in the future and often stretch out over many years. In such situations, participants (or their beneficiaries) may attempt to argue that the limitations period runs, not from the date of the plan termination, but from the receipt of allegedly insufficient benefits. Indeed, there is a line of cases adopting just such a view, holding that a new cause of action arises for purposes of the statute of limitations every time a benefit check is issued to a participant. *See Meagher v. International Ass'n of Machinists & Aerospace Workers Pension Plan*, 856 F.2d 1418, 1422-23 (9th Cir. 1988), *cert. denied*, 490 U.S. 1039 (1989).

Thus, a substantial probability remains that the decision below—which, after all, creates substantial incentives for plan participants to raise claims—will have a broad impact. Likewise, the decision below is likely to lead to results that differ solely due to the forum selected for these claims, since, as the Solicitor General recognized (SG Br. 15), the approach that the Fourth Circuit applies "is contrary to that used by other circuits."

II. THE EXISTENCE OF AN UNSPECIFIED "REGULATION PROJECT" DOES NOT ELIMINATE THE NEED FOR REVIEW BY THIS COURT

Ultimately, even the Solicitor General recognizes that REA does not eliminate the need for review in this case. Rather, the Solicitor General reports (SG Br. 17) that, "even after REA," a court may misconstrue the pension law terms at issue here by failing, like the court below, to read them in light of the underlying statutory and regulatory framework—a result that the Solicitor General concedes (SG Br. 17) would be "of significance . . . since so many plans use the terms." Thus, the Solicitor General's "primary reason" (SG Br. 15) to deny review collapses and, in its place, all the Solicitor General can offer (SG Br. 17) is an oblique reference to a "regulation project" that has been "initiated" by the IRS. This feeble response fails to demonstrate why review of an erroneous decision that has created a conflict in the circuits on a question of national importance is not appropriate.

First, any regulation that the IRS now adopted likely could have only prospective application. As this Court noted in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208-09 (1988), "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." Congress has not done so here, and thus the "regulation project" pointed to by the Solicitor General is fundamentally unable to "provide further guidance" for any plan termination taking place prior to the regulation's final adoption.

Second, the "regulation project" disclosed by the Solicitor General has never previously been publicly announced.[2] It thus clearly is in its very infancy (despite

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[2] The IRS releases periodic reports identifying all regulatory projects. In none of those reports, from 1984 to the most recent

the fact that the panel issued its opinion in this case well over a year ago). Any regulations that the IRS develops must go through the prescribed notice and comment process before they could even conceivably address "the issues presented in this case." (SG Br. 17). Even in normal circumstances, such regulatory projects take years to complete; the IRS regulations implementing REA, for example, were finally adopted four years after the statute was enacted. *See* 53 Fed. Reg. 26,050 (July 11, 1988).

Moreover, in the present environment there is substantial reason to doubt that this "regulation project" will be able to move forward at all. The Administration recently has announced plans to curtail new regulatory programs (presumably including the one pointed to by the Solicitor General), established new guidelines that must be met before regulations can be issued, and implemented a series of general moratoriums on regulations.[3] In this context, the Solicitor General's expectation (SG Br. 17) that the regulations, if any, that eventually result from the IRS's new project "should provide further guidance" is cold comfort to Mead and other pension plan administrators and actuaries who must grapple—immediately and on a daily basis—with the uncertainty created by the decision below.

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report in April 1992, has the IRS identified a regulatory project on "contingent liabilities" or "actuarial error" under Code § 401(a)(2) and Treas. Reg. § 1.401-2(b). *See, e.g.*, Daily Tax Rep. (BNA), Rep. No. 84 (Apr. 30, 1992) (reprinting Report By Office Of Chief Counsel, Internal Revenue Service On Regulations Projects Status And Disposition As Of March 31, 1992; no listing of the regulation project referred to by the Solicitor General).

[3] *See* Memorandum on Reducing the Burden of Government Regulation—January 28, 1992, 28 Weekly Comp. Pres. Doc. 232-34 (Feb. 17, 1992) (90-day moratorium); Memorandum on Implementing Regulatory Reforms—April 29, 1992, 28 Weekly Comp. Pres. Doc. 728-29 (May 4, 1992) (120-day moratorium).

Finally, the Solicitor General's conclusion (SG Br. 17) that review is unnecessary because new IRS regulations will clarify the meaning of "contingent liabilities" and "actuarial error" is, to say the least, highly paradoxical in light of the Solicitor General's earlier acknowledgment (SG Br. 12-13) that an elaborate framework of existing regulations and revenue rulings *already* have clearly established the proper meaning of both terms. Indeed, the Solicitor General agrees (SG Br. 13, 15) that the Fourth Circuit's fundamental error was its failure even to consider the "IRS's long-standing administrative construction" of the relevant provisions. In essence, then, the Solicitor General is suggesting that review is not necessary because new regulations may at some point in the future clarify something that the PBGC, the IRS, "[o]ther courts of appeals" (SG Br. 12), and the Solicitor General himself already consider to be crystal clear. Such a suggestion is not a sufficient or appropriate basis for denying review of a concededly erroneous decision that has created a conflict on an issue crucial to pension plan administration.

Left uncorrected, the Fourth Circuit's decision requires Mead to make substantial payments of unearned early retirement benefits that the agencies and the Solicitor General agree (SG Br. 11-13) Mead has no obligation to make. To prevent such an inappropriate and unjust result, this Court should grant certiorari. Alternatively, since the Solicitor General, speaking for both the PBGC and the IRS, has adopted the analysis of Judge Chapman's dissent, the decision below should be summarily reversed on the basis of that dissent.

CONCLUSION

For the foregoing reasons and those set forth in Mead's petition and reply memorandum, the Court should grant certiorari or summarily reverse.

Respectfully submitted,

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